UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PACIFIC MARITIME ASSOCIATION

and Case No. 21-CA-39434

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION, LOCAL NO. 13, AFL–CIO

and Case No. 21-CB-14966

ERIC ALDAPE, an individual

ACTING GENERAL COUNSEL'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND IN OPPOSITION TO CROSS-EXCEPTIONS OF PACIFIC MARITIME ASSOCIATION

I. INTRODUCTION

The Acting General Counsel alleges in these proceedings that Respondent International Longshore and Warehouse Union, Local No. 13, AFL-CIP, herein Union, and Respondent Pacific Maritime Association, herein Employer, have violated Sections 8(b)(1)(A) and 8(a)(1), respectively, of the Act by allowing a collectively-bargained special grievance procedure to be used to restrain and coerce Charging Party Eric Aldape, herein Aldape, in the exercise of his Section 7 rights, enforcing the results of that procedure by suspending Aldape from work for 60 days and from the more-lucrative night shift for two years, and maintaining records of said discipline. Both Respondents contend that Aldape's activity that resulted in the filing of three complaints against him under this special grievance procedure was not protected by Section 7 of the Act and, alternatively, that, even if protected, lost its protection by the nature of his conduct.

Neither Respondent has defended the propriety of applying this special grievance procedure to Aldape. The procedure was negotiated to provide a forum for employees, who have been the victim of conduct amounting to harassment or discrimination made unlawful under state and federal equal employment opportunity laws, to seek redress and thereby comply in part with Respondents' obligations under said laws. Both Respondents apparently concede that the special grievance procedure was improperly applied against Aldape (the Employer even admits that the Realini Grievance was improperly brought) but contend that it does not matter because his conduct was not protected.

II. ALDAPE'S CONDUCT WAS PROTECTED BY THE ACT

The Acting General Counsel submits that Respondents are missing the forest due to the proverbial trees. The forest that they are missing is that Aldape lost thousands of dollars as a result of the suspension jointly imposed by the Union and the Employer, thereby directly impacting his employment relationship. They argue, citing *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565 (1978), and *OPEIU, Local 251 (Sandia Corp. dba Sandia National Laboratories,* 331 NLRB 1417 (2000) that an employee's activity, or a dissident union member's activity, must relate to employee interests in improving terms and conditions of employment in order to fall within the protection of Section 7. It is clear that Aldape's conduct herein does relate to such employee interests. Aldape's activity in the Droege and Bebich Grievances was directly related to his efforts to politically oppose incumbent union officers of his union and thereby change the policies of his union.

As stated in Acting General Counsel's initial brief, the Board has stated: "For many years the Board has ruled efforts by a union member/employee to attempt to change current policies of the union which represents him or to politically oppose an incumbent union officer of

that union are the exercise of rights guaranteed by Section 7 of the Act." *Teamsters Local 186 (Associated General Contractors),* 313 NLRB 1232, 1234-35 (1994) (see cases cited therein); *Mobil Oil Exploration & Producing, U.S. Inc.,* 325 NLRB 176 (1997) (see cases cited therein). See General Counsel's Brief in Support of Exceptions at 16. For example, in *United Steelworkers of America, Local 1397,* 240 NLRB 848, 49 (1979), the Board, in a case where the union threatened to have a dissident member fired for politically opposing the incumbent leadership, stated:

> ...That an employee's right to engage in intraunion activities in opposition to the incumbent leadership of his union is concerted activity protected by Section 7 is, of course, elementary.

In *Heavy and Highway Construction Workers' Local Union No. 158 (Worthy Brothers),* 280 NLRB 1100 (1986), the Board found a union's refusal to refer for employment dissident members who opposed the incumbent leadership to violate Section 8(b)(1)(A); see also *International Association of Bridge, Structural, and Ornamental Iron Workers (Papco, Inc.),* 276 NLRB 1273 (1985)(refusal to refer "longtime critic of union officers and policies" unlawful). These cases postdate *Eastex* and were not overruled by *Sandia.*

What *Sandia* did was overrule those cases holding unlawful the imposition of internal union discipline where said discipline had no effect on the employee's employment relationship.

> ...we find that Section 8(b)(1)(A)'s proper scope, in union discipline cases, is to proscribe union conduct against union members that impacts on the employment relationship...Consistent with our holding, we shall overrule several cases in which the Board has found violations of Section 8(b)(1)(A) even in the absence of any meaningful correlation to the employment relationship and the policies of the Act...

Sandia, supra at 1418-19. Thus, in *Sandia,* one union faction was expelled from membership over a dispute over the payment of union funds to a law firm in settlement of a dispute. *Sandia, supra* at 1417. The employment of the employees/members who were expelled from union

membership was not affected: "...there is no contention that the internal disciplinary action taken against them by the Respondent affected their employment with Sandia." *Ibid.* Here, Aldape's employment relationship with the various employers comprising the Employer was clearly affected, and Respondents cannot argue otherwise.[1] In a decision post-dating *Sandia,* the Board explained that *Sandia* applies only to factual situations where the employment relationship is not impacted. *Brandeis University,* 332 NLRB 118 (2000). See discussion of *Brandeis* in Acting General Counsel's initial brief herein at 20-23. It is noteworthy that neither Respondent discusses *Brandeis* (the Union cites it without discussion; see Union's Answering Brief at 38). This is because *Brandeis* clearly puts to rest their argument that *Sandia* overruled Board cases involving internal union discipline which impacted the employment relationship.

In *Brandeis,* the Board assumed without deciding that the employment relationship was impacted. (The Union had removed a dissident member from his position as shop steward and member of a joint labor-management committee. Compare that impact with the impact suffered by Aldape herein, outright suspension for 60 days, two years' banishment from the night shift, and requirement to attend diversity rehabilitation.) However, it then applied a balancing test and found that the restraint on the member's Section 7 rights was more than counterbalanced by the union's legitimate interest. But, here, the Union has nothing to place on the balancing scale

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[1] What the Union attempts to do is construe the facts so that the focus is not on issues potentially impacting Aldape's employment relationship but on peripheral or collateral issues. Aldape believed that Mark Jurisic was a corrupt member of the Union's Executive Board and publicized his belief that Jurisic had improperly pulled some strings to keep his daughter employed. The flyer was an attack on Mark Jurisic, a union officer, not an attack on his unnamed child. Ridding union leadership of corruption clearly impacts employee members terms and conditions of employment. Similarly, the Bebich matter involved a dispute between members of two political factions at the Union. Aldape believed that Bebich was corrupt and should not be serving as a caucus delegate. (Bebich's response of "maybe" to the question whether he was running for caucus delegate at the time of telephone call (Tr. 218) can only be interpreted as an affirmative response.) He had just unsuccessfully run for the position of Secretary-Treasurer. It is clear from the entire testimony herein that union politics, with its elections at least every six months, is an ongoing continual thing with this Union. The Union's argument that Aldape's conduct that resulted in the Realini Grievance, i.e., that mechanics were unfairly getting priority in dispatches to jobs, has no impact on employment terms and conditions is incomprehensible. The more dispatches one gets, the more one earns. Wages are a terms and condition of employment.

because it disclaims any interest or involvement in the proceedings against Aldape. Thus, there is no Union interest to weigh against the obvious chilling impact of the actual partial loss of Aldape's livelihood and the potential complete loss of his livelihood through deregistration in future similar complaints against him.

Therefore, on the bases of the correct understanding of *Sandia* as explained by *Brandeis* and the rulings for many years that internal union discipline impacting the employment relationship is within the protection of Section 7 of the Act, the Acting General Counsel respectfully submits that the Administrative Law Judge erred in concluding that Aldape's conduct herein was not protected by the Act.

III. ALDAPE DID NOT LOSE THE ACT'S PROTECTION

The above discussion focuses on *Sandia* and *Brandeis* because the ALJ based his conclusion on the former. But those two cases, as well as the third case discussed by the ALJ, *United Steelworkers of America Local 9292 (Allied Signal Technical Services Corporation),* 336 NLRB 52 (2001), involved internal union discipline of a member. The employers were not involved. But Aldape was not disciplined by the Union; this case does not involve internal discipline. Rather, he was jointly disciplined by the Union and the Employer pursuant to a collectively-bargained special grievance procedure.[2] Under these facts, the more relevant and controlling Board authority is *Consolidated Diesel Co.,* 332 NLRB 1019 (2000), and *Barton Brands,* 298 NLRB 976 (1990). See General Counsel's Brief in Support of Exceptions at 16-17.

[2] The Union and the Employer repeatedly argue that they were not involved in the disciplined. The Acting General Counsel disagrees because both parties negotiated and maintained the special grievance procedure and allowed the complaints against Aldape to proceed. Thus, the Respondents facilitated and enabled the processing of the grievances herein. They allowed these complaints to be processed despite their knowledge that Aldape's Section 7 rights were being chilled and despite their knowledge that the specials grievance procedure was being misapplied. Moreover, the Union's claims that it was not involved in these grievances is suspect, given that the Droege and Bebich grievances were instigated and filed, respectively, by Mark Jurisic and Steven Bebich, two members of the ruling clique of which Aldape had a history of opposing.

In possible recognition that the Judge erred in finding that Aldape's activities were not protected, Respondents focus their arguments on the issue that was litigated at the hearing herein but not addressed in the Judge's Decision and Order, i.e., whether the nature of Aldape's conduct removed that conduct from the protection of the Act. Acting General Counsel fully addressed this issue in his initial brief. See General Counsel's Brief in Support of Exceptions at 24-28. The Acting General Counsel respectfully submits that the issues herein should be analyzed under the Board's decisions in *Valley Hospital Medical Center,* 351 NLRB 1250 (2007), and *El Mundo Broadcasting Corp.,* 108 NLRB 1270 (1954). Thus, where an employee relays in good faith what he has been told by other employees, the fact that the report is inaccurate does not make the employee's conduct unprotected, nor does the hyperbolic or biased nature of the employee's conduct in the context of an identified, emotional labor dispute render the conduct unprotected. Inaccurate or defamatory statements must be "deliberately or maliciously false."

The facts herein are not in dispute. Based on rumors, Aldape accused Mark Jurisic of pulling strings for an unnamed child who had failed a drug test. The child, Droege, indeed had received a letter from the Employer stating she had failed a drug test but, apparently, the test was a false positive due to the collector's error. In a telephone message, Aldape had threatened to expose Bebich's arrest in San Francisco while serving as a caucus delegate and his stealing of a computer from an employer member of the Employer. Bebich had indeed been arrested in San Francisco while serving as a caucus delegate, and he had been accused by his employer of stealing a computer but the discharge proceedings were dropped when Bebich resigned. Both the Jurisic/Droege and Bebich incidents were the subject of many rumors on the waterfront; the

Bebich incident was true, and the Jurisic/Droege incident had a basis in truth but subsequently turned out to be false.[3]

The Union seeks to rely herein on *KGO, Inc.*, 315 NLRB 570, 571 (1994) and *HCA Health Services of New Hampshire, Inc.*, 316 NLRB 919 (1995). The Union's reliance on *KGO* is misplaced, because the Board clearly states therein that relaying information in good faith what one has heard from others does not lose one's protection under the Act even if the information turns out to be false. Moreover, the person relaying the inaccurate remarks has no duty to independently investigate the accuracy of the remarks.[4] *KGO, Inc., supra* at 571 n. 6; *HCA Health Services, supra* at 919 n. 4.. Thus, *KGO* contains almost the same set of facts as presented in the Bebich incident. In *HCA Health Services,* the Board stated that "a defamatory statement is so opprobrious as to lose the protection of the Act if it is made 'with knowledge of its falsity, or with reckless disregard of whether it was true or false.'" In *HCA Health Services,* the ALJ found that Twitty had acted in bad faith, and the Board found that Twitty either already knew or reasonably should have known that the rumor was false. *HCA Health Services, supra* at 919 n. 4. Those are not the facts of the instant case, as the Union introduced no evidence that Aldape should have known that the rumors everywhere on the waterfront about Jurisic's unnamed child were false.

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[3] Contrary to the Union's contentions, Mark Mendoza, a former Union president and a witness called by the Union, did confirm that there were "rumors everywhere…on the waterfront in Long Beach and San Pedro" that a family member of Mark Jurisic had tested positive for a drug test. Tr. 213. Also, Union Business Agent Joe Donato, another witness called by the Union confirmed that he had told Aldape that "allegedly it did happened" and that there were rumors "all over the docks" that Bebich had stolen the computer. Tr. 235, 237. These comments were made by Donato to Aldape in the context of a discussion of Bebich's candidacy for union office. Tr. 92-93.

[4] The Union has suggested that Aldape should have contacted Droege to ask her if she had failed a drug test. Aside from the absurdity of this suggestion on its face, Aldape did not know that Droege was the unnamed child of Jurisic (there were two others), and the information could not have been obtained from the Employer or urine specimen collection agency as it was confidential.

IV. ALL ALLEGATIONS IN THE COMPLAINT ARE TIMELY

The Union contends that the "suspended" portion of the penalty assessed against Aldape as a result of the Droege grievance is outside the Section 10(b) limitations period. The Union did not except to the ALJ's conclusion that the Bebich grievance was within Section 10(b). Thus, as a practical matter, if the ALJ is upheld on the Section 10(b) issue, 15 days of the 60 day suspension imposed as a result of the Bebich Award will be beyond the Board's remedial reach, but the additional 45 days of suspension, the two-year ban from the night shift, and the requirement to attend diversity rehabilitation classes are within the Board's remedial authority. The Acting General Counsel has briefed this issue in his initial brief and does not believe any further response is warranted. See General Counsel's Brief in Support of Exceptions at 13-15.

V. CONCLUSION

For the reasons stated above, the Acting General Counsel respectfully requests the Board to reject the Decision of the Administrative Law Judge herein and, instead, issue a Decision and Order finding that the Union and the Employer violated Sections 8(b)(1)(A) and 8(a)(1) of the Act, respectively, and to fashion an appropriate remedy.

Dated this 9th day of December, 2011.

/s/ David B. Reeves

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DATE OF MAILING December 9, 2011

AFFIDAVIT OF SERVICE OF ACTING GENERAL COUNSEL'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND IN OPPOSITION TO CROSS-EXCEPTIONS OF PACIFIC MARITIME ASSOCIATION

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document*(s)* by electronic mail upon the following persons, addressed to them at the following addresses:

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Subscribed and sworn to before me on **December 9, 2011**	DESIGNATED AGENT Susie Louie **NATIONAL LABOR RELATIONS BOARD**